A

CHEAH WAI KONG

v.

PP & ANOTHER APPEAL

B

HIGH COURT MALAYA, KUALA LUMPUR
AMELIA TEE ABDULLAH J
[CRIMINAL APPEALS NO: 41(O)-96-07-2012
& 41(H)-97-07-2012]
17 FEBRUARY 2014

C

CUSTOMS AND EXCISE: *Classification of goods - Uncustomed goods - Accused acquitted and discharged of charge under s. 135(1)(d) of Customs Act 1967 - Whether there was doubt as to nature of offence - Whether charge speaks of possession of uncustomed goods or prohibited*
D *goods - Whether charge ambiguous and lacked clarity*

CUSTOMS AND EXCISE: *Forfeiture - Conditions for forfeiture - Whether goods proven to be prohibited goods - Whether there was prosecution with regards to goods seized - Whether court had recourse to ss. 127(1) and 128 of Customs Act 1967*
E

CRIMINAL PROCEDURE: *Charge - Framing or particulars of - Accused acquitted and discharged of charge under s. 135(1)(d) of Customs Act 1967 - Whether there was doubt as to nature of offence - Whether charge speaks of possession of uncustomed goods or prohibited goods -*
F *Whether charge could be amended at appellate stage - Criminal Procedure Code, ss. 167, 173(h)(ii) & 316*

The appellant/accused was charged in the Magistrate's Court for an offence of knowingly being in possession of uncustomed goods,
G *ie*, 60 helmets, under s. 135(1)(d) of the Customs Act 1967 ('the Act'). At the close of the prosecution case, the Magistrate, having found that the prosecution had failed to make out a *prima facie* case against the accused of the offence charged, acquitted and discharged him without calling for his defence. The Magistrate
H however, ordered that all the items seized be forfeited to Customs under s. 127 of the Act. Being dissatisfied with the order, the prosecution appealed against the order of acquittal and discharge whilst the accused filed a cross appeal against the order of forfeiture of the 60 helmets. The prosecution drew the court's
I attention to the specifics of the charge and submitted that whilst the accused was charged with knowingly being in possession of uncustomed goods, the evidence would lean more towards an offence of possession of prohibited goods under s. 135(1) of the

Act. The prosecution thus urged the court to exercise its powers under ss. 316(a) and 167 of the Criminal Procedure Code ('CPC') and to amend the charge notwithstanding that the case was at the appeal stage. On the other hand, the main thrust of the appeal by the accused was that the Magistrate was in error when he failed to appreciate that before an order of forfeiture could be made under s. 127(1) of the Act, the prosecution would nevertheless have to discharge the burden of proving that the seized goods were in fact prohibited goods and that the prosecution had failed to do so. In determining the appeal by the prosecution, the court considered two aspects, namely: (i) whether it was prejudicial to the accused to amend the charge at the appeal stage; and (ii) whether the helmets were prohibited goods. With regard to the second issue, the prosecution relied on Item 5 of the Second Schedule of the Customs (Prohibition of Imports) Order 2008 ('D25') which provides 'safety helmets except as worn by motorcyclists or motorcycle pillion riders'. Meanwhile, the accused produced exh. D24, a document taken from the Ministry of International Trade and Industry which says that safety helmets require APs including motorcycle helmets.

Held (dismissing appeal by prosecution and allowing appeal by accused):

(1) Before a court is able to invoke s. 167 of the CPC, it would have to be satisfied that the act or acts committed by the accused was of such a nature that there was doubt as to which of several offences he may have committed and that the accused may have been charged with having committed all of such offences at that time. (para 12)

(2) The accused person was entitled to know clearly the offence with which he is charged. However, the charge with which the accused was charged herein was bad for ambiguity and lack of clarity. Whilst the first part of the charge speaks of knowingly being in possession of uncustomed goods, the charge went on to say that the goods were prohibited goods, in that they constituted goods which might not be imported except under an import licence as provided in Item 5. (paras 14 & 15)

(3) The prosecution's reference to s. 173(h)(ii) of the CPC as affording the court the power to amend the charge at this stage was misconceived. Section 173 sets out the procedure for summary trials and cannot be said to apply to a judge

hearing an appeal as found in s. 316 of the CPC. The various options open to a judge sitting to decide an appeal against a decision of a lower court does not include the framing of a different charge on which the accused was not charged before the lower court nor an amendment of the charge at the High Court stage. (para 3)

(4) The court would nevertheless decline to amend the charge at this stage on the ground that the court was not satisfied that the accused would not be prejudiced through the amendment. There was also no positive guarantee that had the proposed amended charge been available to the accused from the beginning or that the nature of his defence as put to the prosecution witnesses through cross-examination would be the same. (para 21)

(5) The differences between D24 and D25 were glaring and would require more than a fleeting glance. A reading of D25 would bring the meaning that safety helmets as worn by motorcyclists and motorcycle pillion riders are the exception in Item 5 whilst D24 would bring the meaning that the motorcycle helmets would require an AP. In light of the clear difference or discrepancy between the two documents, it would have been incumbent upon the prosecution to refer the question to the Director General for his decision pursuant to s. 32(2) of the Customs Act 1967. However, there was no evidence that this was done. It is trite law that when there are two possible interpretations of a penal provision, the interpretation which is most favourable to the accused must be adopted. Thus, the more favourable interpretation is that motorcycle helmets are excluded in Item 5. (paras 27-30)

(6) The issue as to whether or not the goods seized were in fact prohibited goods was left unresolved right to the very end. In the circumstances, the Magistrate could not have had recourse to s. 127(1) of the Act to order the forfeiture of the goods seized since it was not proved that the goods were in fact prohibited goods. There could also be no recourse to s. 128 of the Act to order the forfeiture of the goods seized because this was not such a case where there was no prosecution with regard to the goods seized. Hence, the subject matter, namely the 60 helmets, was ordered to be returned to the accused. (paras 36 & 37)

Obiter

(1) All prosecuting officers and law enforcement agencies need to take extreme care and to be quite meticulous in the drafting and framing of charges. Criminal charges in the criminal courts, as are pleadings in the civil courts, formed the very basis or framework of their cases. A charge which is not properly framed such that no offence is made out, or is ambiguous, may well lead to disastrous results. (para 22)

Case(s) referred to:
Koo Cheh Yew & Anor v. PP [1977] 1 LNS 48 HC ***(refd)***
Lew Cheok Hin v. Regina [1956] 1 LNS 55 HC ***(dist)***
Mejar Ali Zaman Ali Hassan v. Capt Abdul Kadir & Anor [1989] 2 CLJ 643; [1989] 2 CLJ (Rep) 117 HC ***(dist)***
PP v. Lee Wye Kheng [1976] 1 LNS 101 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 166, 167, 173(h)(ii), 316(a)
Customs Act 1967, ss. 2, 31, 32(2), 127(1), 128, 135(1)(d)

(Criminal Appeal: 41(O)-96-07-2012)
For the appellant - Mohamed Fadly Zakariya; M/s Zuraidah Naziha & Fadly
For the prosecution - Azamuddin Abdul Aziz; DPP

(Criminal Appeal: 41(H)-97-07-2012)
For the prosecution - Azamuddin Abdul Aziz; DPP
For the respondent - Mohamed Fadly Zakariya; M/s Zuraidah Naziha & Fadly

Reported by S Barathi

JUDGMENT

Amelia Tee Abdullah J:

[1] Cheah Wai Kong (the respondent in Rayuan Jenayah: 41(H)-97-07/2012 and the appellant in Rayuan Jenayah 41(O)-96-07/2012) was charged in the Magistrate's Court Kuala Lumpur on the following charge:

> Bahawa kamu Cheah Wai Kong (K/P: 640710-10-7511) pada 1 November 2011 kira-kira jam 1.20 petang di WKM Motorsport Sdn Bhd beralamat di No. 35 Jalan Tun Razak, 50400 Kuala Lumpur dalam negeri Wilayah Persekutuan Kuala Lumpur dengan disedari memilik barang-barang belum lulus kastam iaitu:

A (1) 5 unit helmet motosikal jenama Shoei;

(2) 11 unit helmet motosikal jenama Nolan;

(3) 23 unit helmet motosikal jenama Caberg; dan

B (4) 21 unit helmet motosikal jenama Arai.

bernilai RM90,000 (anggaran) dimana barang-barang tersebut di atas merupakan barang larangan import di bawah jadual kedua, butiran 5 di dalam perintah kastam (larangan mengenai import) 2008 dengan niat untuk mengelak peruntukan larangan tersebut C dan dengan itu kamu melakukan satu kesalahan di bawah s. 135(1)(d) Akta Kastam 1967 dan jika sabit kesalahan, kamu boleh dihukum di bawah s. 135(1)(iii)(aa) Akta yang sama.

[2] On 3 July 2012, at the close of the prosecution case, the learned Magistrate found that the prosecution had failed to make D out a *prima facie* case against the accused on the offence charged and acquitted and discharged him without calling for his defence. The learned Magistrate also ordered that all the items seized be forfeited to Customs.

E **[3]** The Public Prosecutor, being dissatisfied with the order of acquittal and discharge without calling for the accused's defence, has appealed against the said order of acquittal and discharge (Rayuan Jenayah: 41(H)-97-07/2012). The accused, Cheah Wai Kong, being dissatisfied with the order of forfeiture in respect of F the seized goods, has filed a cross-appeal against the order of forfeiture of the 60 helmets (Rayuan Jenayah: 41(O)-96-07/2012).

[4] On 5 February 2013, after hearing the Deputy Public Prosecutor's appeal against the order of acquittal and discharge G together with the accused's cross-appeal against the order of forfeiture of the seized goods, the court had dismissed the Public Prosecutor's appeal against the order of acquittal and discharge (Rayuan Jenayah: 41 (H)-97-07/2012) and allowed the accused's appeal against the order of forfeiture of the seized goods (Rayuan H Jenayah: 41(O)-96-07/2012).

[5] The following constitutes the grounds of my decision. I will deal with each of the two appeals in turn.

I

Re: Rayuan Jenayah 41(H)-97-07/2012 – The Public Prosecutor's Appeal Against The Order Of Acquittal And Discharge

[6] The grounds for the learned Magistrate's decision in acquitting and discharging the accused without calling for his defence, as can be found in his alasan penghakiman, is quite simple and straightforward, namely:

(i) That the prosecution had failed to comply with the requirements of s. 128 of the Customs Act 1967;

(ii) That the prosecution had failed to call a material witness, namely Puan Norsalawati from MITI; and

(iii) The failure of the prosecution to prove the element of knowledge or *mens rea* under s. 135(1)(d) of the Customs Act 1967.

[7] Before me, the submissions of the learned Deputy Public Prosecutor for the appellant took a different slant from his prepared written submissions when the court's attention was drawn to the specifics of the charge. In his additional submission in relation to the charge ("hujahan tambahan mengenai pertuduhan"), he did not dispute that whilst the accused was charged with knowingly being in possession of uncustomed goods ("dengan disedari memilik barang-barang belum lulus kastam"), however the evidence that was adduced in this case would lean more towards an offence of possession of prohibited goods ("memiliki barangan larangan"). However, the learned Deputy sought to argue that possession of prohibited goods was also an offence under s. 135(1) of the Customs Act 1967. The main thrust of his submissions was thus to urge the court to exercise its powers under s. 316(a) and 167 of the Criminal Procedure Code and to amend the charge notwithstanding that the case is now at the appeal stage.

[8] As such, the learned deputy's submissions in the main revolved around whether this court has the power to amend the charge at this stage of proceedings.

[9] Section 167 of the Criminal Procedure Code reads as follows:

> 167. **If in the case mentioned in s. 166** the accused is charged with one offence and it appears in evidence that he committed a different offence for which he might have been charged under the

provisions of that section, he may be convicted of the offence which he is shown to have committed although he was not charged with it.

(emphasis added)

[10] Looking at s. 167, it would appear that for s. 167 to apply, the case must first be one in which s. 166 is applicable.

[11] Section 166 reads as follows:

166. If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of those offences; and any number of the charges may be tried at once, or he may be charged in the alternative with having committed some one of the said offences.

[12] From a reading of the above provisions of the Criminal Procedure Code, the court is satisfied that before a court is able to invoke s. 167, it would have to be satisfied that the act or acts committed by the accused was of such a nature that there was doubt as to which of several offences he may have committed and that the accused may have been charged with having committed all of such offences at that time. The question to be considered at this stage is this: was there any doubt as to the nature of the offence that was committed by the accused in this case?

[13] The words "prohibited goods" and "uncustomed goods" are clearly defined in s. 2 of the Act. "Prohibited goods" refers to goods the import or export of which is prohibited, either absolutely or conditionally by an order under s. 31 or by any other written law. "Uncustomed goods", on the other hand, means goods in respect of which there is a breach of the provisions of the Act or any subsidiary legislation made under. It is true that s. 135(1)(d) of the Customs Act 1967 makes it an offence for anyone who "knowingly harbours, keeps, conceals, or is in possession of, or permits, suffers, causes or procures to be harboured, kept or concealed, any uncustomed or prohibited goods", which section would include both:

(i) Knowingly being in possession of uncustomed goods; and

(ii) Knowingly being in possession of prohibited goods.

The court is of the view that an offence of knowingly being in possession of prohibited goods, which constitutes an offence, may well be covered under the offence of knowingly being in possession of uncustomed goods.

[14] Notwithstanding the above, the court is of the considered view that the accused person in this case is entitled to know clearly the offence with which he is charged. Is the possession of the 60 helmets, which is not disputed, an offence because the helmets were prohibited goods? Or is the accused's possession of the helmets an offence because the helmets were uncustomed goods? For this second proposition, the possible breaches under the Customs Act and its regulations are too numerous to enumerate here.

[15] It suffices to say that the charge with which the accused stands charged is bad for ambiguity and lack of clarity. Whereas the first part of the charge speaks of knowingly being in possession of uncustomed goods, the charge goes on to say that the goods were prohibited goods, in that they constitute goods which may not be imported except under an import licence as provided in Item 5 of the Second Schedule of the Customs (Prohibition of Imports) Order 2008 [PU(A) 86/2008].

[16] The learned deputy, in urging the court to amend the charge to remove the ambiguity and reference to two separate offences, has referred the court to a number of authorities from which clear principles of law in relation to this issue becomes apparent. The court has thus taken note of the following cases:

(a) In the case of *Lew Cheok Hin v. Regina* [1956] 1 LNS 55; [1956] MLJ 131, Taylor J held that before a court can exercise its powers to amend, alter or substitute a charge, there are two main tests to be fulfilled, namely:

(i) The facts must be such that the unframed charge was available from the start and could have been framed and tried concurrently under s. 166 of the CPC; and

(ii) The evidence must have been presented in such a way as to raise all the same issues of fact as would have been raised had the unframed charge been framed and trial claimed on it. Not only must the evidence of the prosecution be the same but the court must be satisfied that the evidence for the defence must also be the same.

(b) In *Mejar Ali Zaman Ali Hassan v. Capt Abdul Kadir & Anor* [1989] 2 CLJ 643; [1989] 2 CLJ (Rep) 117; [1989] 3 MLJ 32, His Lordship Edgar Joseph J held as follows:

> ... A conviction upon a charge which was not expressly formulated is not illegal where the acts which it was necessary to prove on a charge as framed and in respect of which evidence was led by the prosecution are the same as the facts upon which the accused could be convicted of the charge which was not expressly formulated, provided that the accused is put to no disadvantage and would have had to adduce no further evidence ...

[17] In coming to a decision of this issue, the court has looked at it from two aspects, namely:

(i) Whether it was prejudicial to the accused to amend the charge at the stage of appeal; and

(ii) Whether the helmets were prohibited goods.

[18] On the first issue, the court notes the cases cited by the learned deputy were cases where the district judge/general court martial had convicted the accused under a different charge from what the accused was initially tried for. They were not cases where the appeal court was being asked to amend the charge at the appeal stage. The court finds that there is an appreciable difference between the cases cited and the instant appeal.

[19] The court is of the view that the learned deputy's reference to s. 173(h)(ii) of the Criminal Procedure Code as affording this court the power to amend the charge at this stage is misconceived. Section 173 sets out the procedure for summary trials and cannot be said to apply to a judge who is hearing an appeal. The powers of a judge hearing an appeal is found in s. 316 of the Criminal Procedure Code which provides *inter alia* as follows:

> 316. At the hearing of an appeal the judge may:
>
> 1. (a) in an appeal from an order of acquittal, reverse the order, and direct that further inquiry be made, or that the accused be re-tried, as the case may be, or find him guilty and pass sentence on him according to law.

[20] The court is satisfied that the various options open to a judge sitting to decide an appeal against a decision of a lower court does not include the framing of a different charge on which the accused was not charged before the lower court nor an amendment of the charge at the High Court stage.

[21] In the event that the court is in error on this issue, the court nevertheless would decline to amend the charge at this stage on the grounds that the court is not satisfied that the accused would not be prejudiced through this amendment. There is also no positive guarantee that had the proposed amended charge been available to the accused from the beginning or that the nature of his defence as put to the prosecution's witnesses through cross-examination would be the same.

[22] At this juncture, the court will not hesitate in expressing a general stricture to all prosecuting officers and law enforcement agencies of the need to take extreme care and to be quite meticulous in the drafting and framing of charges. Criminal charges in the criminal courts, as are pleadings in the civil courts, form the very basis or framework of their cases. A charge which is not properly framed such that no offence is made out, or is ambiguous, may well lead to disastrous results.

[23] And lastly, on the issue of whether the helmets are prohibited goods, the court notes that the prosecution was relying on Item 5 of the Second Schedule of the Customs (Prohibition of Imports) Order 2008 [PU(A) 86/2008] which reads as follows:

> 5. Safety helmets except as worn by motor-cyclists or motor cycle pillion riders.
>
> (emphasis added)

[24] However the defence had also produced a document taken from the Ministry of International Trade and Industry Malaysia ("MITI") website which was marked as exh. D24. The document sets out the goods under the Customs Act which requires an import licence from MITI. Item 32 on this list reads as follows:

> 32. Safety helmets require APs *include* motorcycle helmet. (emphasis added)

[25] The question that now arises for consideration is this: Are the helmets seized from the accused's shop conditional prohibited goods under the second schedule? From the evidence adduced,

the prosecution was relying on the evidence of PW5, Khairul Anuar bin Ismail, a Pegawai Penyiasat Penguasa Kastam to the effect that he had sent a query to MITI and had received an e-mail reply as in ID 23. It is not in dispute that the maker of the e-mail, Puan Norsalawati was never called as a witness and as such, the e-mail was never marked as an exhibit.

[26] Learned counsel for the accused/appellant had submitted that the accused had, on the other hand, tendered in court the Second Schedule of the Customs (Prohibition of Imports) Order 2008 [PU(A) 86/2008] (D25) which lists "safety helmets except as worn by motor-cyclists or motor cycle pillion riders" as one of the items which may not be imported except under an import licence.

[27] The differences between D24 and the Customs Order (D25) are glaring and would require more than a fleeting glance. The court is of the view that a reading of D25 would bring the meaning that safety helmets as worn by motorcyclists and motorcycle pillion riders are the exception in Item 5. The learned deputy had attempted to explain from the bar table that the exception was meant to apply to the helmets that are worn by motorcyclists and their pillions when entering into the country from neighbouring countries. The court is of the view that if that was indeed the intention behind Item 5 of the Customs Order (D25), it should have been better and more succinctly worded. As it is presently worded, Item 5 can be interpreted to mean that whilst other safety helmets (such as those worn on construction sites) would require an import licence, however helmets worn by motorcyclists and motorcyclist pillion riders would not require such a licence.

[28] Meanwhile, the MITI document (D24) states that "safety helmets require APs include motorcycle helmet" and this would bring the meaning that motorcycle helmets would require an AP.

[29] In light of the clear difference or discrepancy between the two documents which were before the learned Magistrate at the hearing, there would have arisen questions or doubts as to whether motorcycle helmets were or were not included as conditional prohibited goods under Item 5. In such circumstances, it would have been incumbent upon the prosecution to refer the question to the Director General for his decision pursuant to s. 32(2) of the Customs Act 1967. There was no evidence before the court that this was in fact done.

[30] It is trite law that when there are two possible interpretations of a penal provision, the interpretation which is most favourable to the accused must be adopted (See: *Koo Cheh Yew & Anor v. PP* [1977] 1 LNS 48; [1978] 1 MLJ 141). Thus the more favourable interpretation is that motorcycle helmets are excluded in Item 5.

[31] The reasons advanced by the learned Magistrate may be somewhat different from this court's. However, for the reasons as stated above, the court was of the considered view that the learned Magistrate was not in error when he found that the prosecution had failed to make out a *prima facie* case against the accused. Accordingly, the decision of the learned Magistrate in respect of the order of acquittal and discharge is affirmed.

Re: Rayuan Jenayah 41(O)-96-07/2012 – The Accused's Appeal Against The Order Of Forfeiture Of The Goods Seized

[32] At the close of the prosecution case, after the learned Magistrate had acquitted and discharged the accused without calling for his defence, he had also made an order that the goods seized be forfeited to Customs in accordance with the provisions of s. 127(1) of the Customs Act 1967.

[33] In his grounds of judgment, more specifically at pp. 8 and 9 of the appeal records, the learned Magistrate had offered the reason that even though the accused was acquitted and discharged, the goods seized nevertheless:

> ... masih terdorong di dalam barangan larangan kerana ianya masih lagi belum di luluskan oleh pihak kastam.

[34] The learned Magistrate had made reference to s. 127(1) of the Customs Act 1967 and the case of *PP v. Lee Wye Kheng* [1976] 1 LNS 101 where the High Court had ordered the forfeiture of the goods notwithstanding that the accused was not convicted of the offence charged because:

> The exhibits have been proved to be prohibited goods and found to be in the possession of the respondent. The trial court was satisfied that an offence against the act has been committed ie, the gold coins were imported by persons unknown without license. The respondent was acquitted on the ground that he had no knowledge that they were prohibited. The exhibits were the

A subject matter of the offence and they still remain prohibited goods. They are liable to forfeiture and ought to be forfeited even though the respondent was not convicted of the offence charged. I am of the opinion that the provision of s. 127 Customs Act applies on all fours.

B **[35]** The main thrust of the accused's appeal is that the learned Magistrate was in error when he failed to appreciate that before an order of forfeiture could be made under s. 127(1) of the Customs Act 1967, the prosecution would nevertheless have to discharge the burden of proving that the seized goods were in fact C prohibited goods. And this the prosecution had failed to prove.

[36] The court is of the considered view that the facts of the case of *PP v. Lee Wye Kheng* (*supra*) relied upon by the learned Magistrate can be easily distinguished from the facts of our instant D case. Whilst the court in *Lee Wye Kheng* had made a positive finding that the gold coins were imported without a licence and were prohibited goods, and that they remained prohibited goods notwithstanding that the respondent was acquitted of the offence charged, the same cannot be said in our instant case. In this case, E the issue as to whether or not the goods seized were in fact prohibited goods was left unresolved right to the very end. In such circumstances, the court is satisfied that the learned Magistrate could not have had recourse to s. 127(1) to order the forfeiture of the goods seized since it was not proved that the F goods were in fact prohibited goods.

[37] The court is further of the view that no recourse could be had to s. 128 of the Customs Act 1967 to order the forfeiture of the goods seized because this was not such a case where there G was no prosecution with regard to the goods seized. Since the accused was in fact charged, the forfeiture of the goods would depend on s. 127 and whether the goods were prohibited goods. And since this was not established, the court is of the considered view that the learned Magistrate was in error when he ordered the H forfeiture of the goods seized to Customs. In the circumstances, and for the reasons as aforesaid, the court had made an order that the subject matter, namely the 60 helmets, be returned to the accused within two weeks.

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